INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	7
Conclusion	21
Appendix	22

CITATIONS

Cases:

Airedale Worsted Mills, Inc. v. *Bonnie Classics*, 198 Misc. 259, 98 N.Y.S. 2d 353	14
Albrecht Chemical Co. (Anderson Trad. Corp.), Matter of, 298 N. Y. 437, 84 N.E. 2d 625	14
Almacenes Fernandez, S.A. v. *Golodetz*, 148 F. 2d 625	10
Alsop v. *Riker*, 155 U.S. 448	19
American Locomotive Co. v. *Gyro Process Co.*, 171 F. 2d 115, certiorari denied, 336 U.S. 909	11
American Locomotive Co. v. *Gyro Process Co.*, 185 F. 2d 316	11
Anaconda, The v. *Amer. Sugar Co.*, 322 U.S. 42	16, 17
Arthur Philip Export Corp. v. *Leathertone*, 275 App. Div. 102, 87 N.Y.S. 2d 665	14
Astley & Tyldesley Coal & Salt & Tyldesley Coal Co., Re Arbitration Between, (1899) 80 L.T. 116	13
Bauer Co., Matter of, 206 App. Div. 423, 201 N.Y.S. 438	11
Behrens (Feuerring), Matter of, 296 N.Y. 172, 71 N.E. 2d 454	13
Benedict v. *City of New York*, 250 U.S. 321	19
Cargo Carriers v. *Erie & St. Lawrence Corp.*, 105 F. Supp. 638	11
Cope v. *Anderson*, 331 U.S. 461	6, 19
Exeter Manufacturing Co., Matter of v. *Marrus*, 254 App. Div. 496, 5 N.Y.S. 2d 438	13
Feuer Transportation, Matter of, 295 N.Y. 87, 65 N.E. 2d 178	16
Galion Iron Works & Mfg. Co. v. *J. D. Adams Mfg. Co.*, 128 F. 2d 411	11
Gardner v. *Panama R. Co.*, 342 U.S. 29	18
Gitelson & Sons, Matter of, 274 App. Div. 480, 84 N.Y.S. 2d 605	14

SEP 6 1951

217308

Cases—Continued

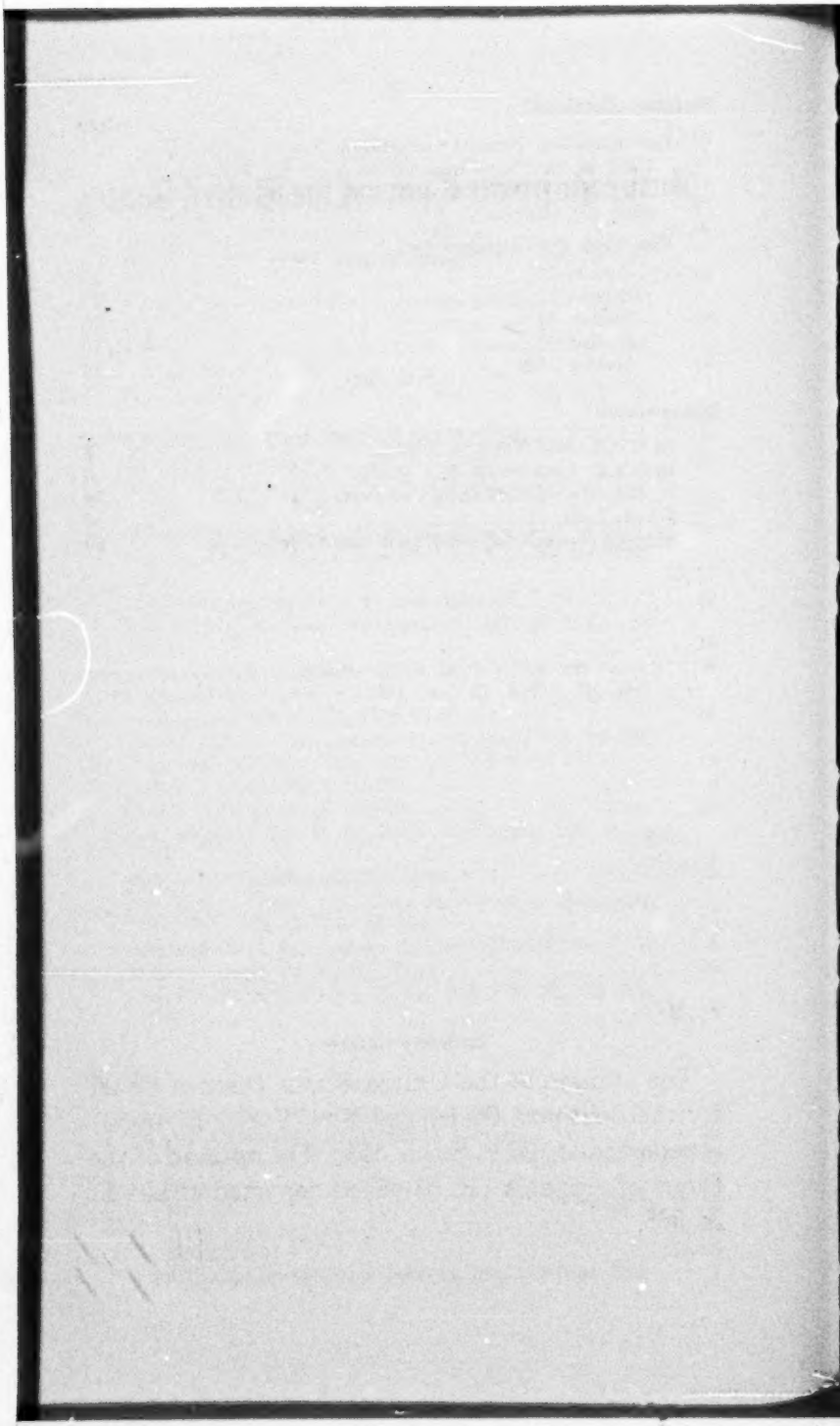
	Page
Godden v. *Kimmell*, 99 U.S. 201	19
Guaranty Trust Co. v. *York*, 326 U.S. 99	6, 19
Hecht Co. v. *Bowles*, 321 U.S. 321	16
Holmberg v. *Armbrecht*, 327 U.S. 392	6, 18, 19
Kramer, Matter of v. *Uchitelle, Inc.*, 288 N.Y. 467, 43 N.E. 2d 493	13, 14
Kulukundis Shipping Co. v. *Amtorg Trading Corp.*, 126 F. 2d 978	16
La Nacional Plantanera v. *North American F. & S.S. Corp.*, 84 F. 2d 881	10
Lipman (Haeuser Shellac Co.), Matter of, 289 N.Y. 76, 43 N.E. 2d 817	13
Marine Transit Co. v. *Dreyfus*, 284 U.S. 263	8
Meredith v. *Winterhaven*, 320 U.S. 228	16
Metro Plan, Inc., Matter of v. *Miscione*, 257 App. Div. 625, 15 N.Y.S. 2d 35	14
Murray Oil Products Co. v. *Mitsui & Co.*, 146 F. 2d 381	8
Nagy v. *Arcas Brass & Iron Co.*, 242 N.Y. 97, 150 N.E. 614	10, 11
Radiator Specialty Co. v. *Cannon Mills*, 97 F. 2d 318	11
Raphael v. *Silberberg*, 274 App. Div. 625, 86 N.Y.S. 2d 421	14
Red Cross Line v. *Atlantic Fruit Co.*, 264 U.S. 109	8
Robinson, Matter of v. *Robinson*, 61 N.Y.S. 2d 859, affirmed, 296 N.Y. 778, 71 N.E. 2d 214	14
Roselle Fabrics, Inc., Application of, 108 N.Y.S. 2d 921, affirmed, 279 App. Div. 1044, 113 N.Y.S. 2d 280	14
Russell v. *Todd*, 309 U.S. 280	6
Shell v. *Strong*, 151 F. 2d 909	17
Son Shipping Co. v. *De Fosse & Tanghe*, 199 F. 2d 687	11
Stanley v. *Schwalby*, 147 U.S. 508	6
Tanenbaum Textile Co., Inc., Matter of v. *Schlanger*, 287 N.Y. 400, 40 N.E. 2d 225	13
Telegraphers v. *Ry. Express Agency*, 321 U.S. 342	8
Wilko v. *Swan*, No. 39, this Term	20
Zimmerman, Matter of v. *Cohen*, 236 N.Y. 15, 139 N.E. 764	10, 11

Statutes:

Act of July 30, 1947, c. 392, 61 Stat. 669, Section 1	2
Federal Arbitration Act, 9 U.S.C. 1, *et seq.*	20
Section 2	10, 15, 22
Section 3	10
Section 4	5, 10, 12, 16, 22
Section 10	12, 24
Section 11	12, 24
Joint Resolution approved June 30, 1945 (59 Stat. 310)	3

Statutes—Continued

	Page
Reconstruction Finance Corporation Act of January 22, 1932, 47 Stat. 5, as amended by § 5 of the Act of June 25, 1940, c. 427, 54 Stat. 572, 573-574, 15 U.S.C. 606b (3), Section 5d	3
New York Civil Practice Act:	
Section 10	14
Section 11	15
Section 15	15
Section 48	6, 14, 15
Section 1459	14
Miscellaneous:	
13 C.F.R. 1941 Supp. p. 1561	3
13 C.F.R. 1946 Supp. 01.1 *et seq.*	3
H. Rep. No. 96, 68th Cong., 1st Sess., p. 1	16
6 F.R. 2970	3
Sturges, *Commercial Arbitration and Awards*, p. ix	20



In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 226

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

HARRISONS & CROSFIELD, LTD., BY FRED PUSINELLI & COMPANY, INCORPORATED, AGENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the Reconstruction Finance Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cause on May 8, 1953.

OPINONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 46-53) is reported at 106 F. Supp. 358. The opinion of the Court of Appeals (R. 61-68) is reported at 204 F. 2d 366.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1953 (R. 68). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an action to compel arbitration under Section 4 of the Arbitration Act is barred by the applicable six year statute of limitations where the demand for arbitration was made and the action to compel arbitration was instituted more than nine years after the contractual right to arbitrate arose.

2. Whether the burden of pleading and proving freedom from laches should not be placed upon an applicant who seeks, in a district court, to compel arbitration of a claim which arose more than nine years before the demand to arbitrate was made or the suit to compel arbitration was instituted.

3. Whether a district court, sitting as a court of equity, should order compulsory arbitration pursuant to Section 4 of the Arbitration Act without passing on the defense that the claim involved in the proceeding is time barred.

STATUTE INVOLVED

9 U.S.C. 2, 4, 10, and 11 are set forth in the Appendix, *infra*, pp. 22-25.[1]

STATEMENT

In December, 1941, the Rubber Reserve Company, a corporate subsidiary of the Reconstruction

[1] Title 9 of the U.S. Code became positive law pursuant to § 1 of the Act of July 30, 1947, c. 392, 61 Stat. 669.

Finance Corporation,[2] entered into a series of crude rubber contracts with Pagel, Horton & Co. By the terms of the agreements, Rubber Reserve agreed to purchase various quantities of crude rubber which was to be shipped to the United States from the Netherland East Indies by January 31, 1942 (Exh. F, R. 25).

The contracts (six in number) evidencing the agreements were identical in form (see Exh. F, R. 25-27) and designated Pagel, Horton & Co. as "Seller" and Rubber Reserve as "Buyer." Payment for the shipments, however, was to be made to Harrisons & Crosfield, Ltd., designated in the contract as "Seller's Eastern Shipper." For payment purposes, Rubber Reserve was to open a line of credit through the Bank of The Manhattan Company, New York, in favor of the Eastern Shipper, Harrisons & Crosfield, Ltd. (R. 25). Payment for the rubber was to be made against confirmed letter of credit upon presentation to an intermediate bank of shipping documents transferring the title to the crude rubber to Rubber Reserve (R. 6, 47-48), and, as a condition to payment, the shipping documents

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[2] Rubber Reserve Company, a corporate subsidiary of R.F.C., was created on June 28, 1940, under authority of § 5d of the Reconstruction Finance Corporation Act of January 22, 1932, 47 Stat. 5, as amended by § 5 of the Act of June 25, 1940, c. 427, 54 Stat. 572, 573-574, 15 U.S.C. 606b(3). The purposes and object of the corporation were to perform the acts and transactions in connection with the acquisition, storage, processing, manufacturing, etc. of natural raw or cured rubber. (6 F.R. 2970; 13 C.F.R. 1941 Supp., p. 1561).

By Joint Resolution approved June 30, 1945 (59 Stat. 310), Rubber Reserve Company was dissolved and its functions, rights, and liabilities were transferred to the Reconstruction Finance Corporation (13 C.F.R. 1946 Supp. 01.1 *et seq.*).

were to "include 'On-Board' bills of lading of ocean-carrying vessel destined for Continental U.S.A. ports, or local or through bill of lading endorsed 'On-Board' by ocean-carrying vessel destined for Continental U.S.A. ports" (Exh. F, R. 25). The contracts all contained arbitration clauses reading as follows (Exh. F, R. 26):

> Failing amicable settlement, all claims, disputes or controversies arising under or in relation to this contract shall be determined by arbitration under the Temporary Procedure for Arbitration between Eastern Shippers, American Dealers, American Consumers, and the Rubber Reserve Company approved by Rubber Reserve Company, September 12, 1941, and such Procedure shall be considered part hereof as if herein set forth in full. [3]

In January, 1942, 661 packages and cases of crude rubber were allegedly "destroyed by enemy action or otherwise lost while in transit" before delivery on board an ocean carrier destined for a United States port (R. 7, 12-13, 47). Although Harrisons & Crosfield was thus unable to present the required on-board bills of lading, nevertheless payment in the amount of $18,622.37, the value of the 661 packages and cases, was obtained under the letter of credit arrangement from an intermediate Far Eastern bank (R. 47-48). Subsequently, Harrisons & Crosfield was required to refund this

[3] The "Temporary Procedure for Arbitration between Eastern Shippers, American Dealers, American Consumers, and the Rubber Reserve Company," approved September 12, 1941, is set forth at R. 19-24.

amount (R. 48) and thereafter, through Pusinelli, an agent, laid claim to the same amount on the basis of an alleged breach, by Rubber Reserve, of the war and marine insurance provisions of the contract (R. 48).[4]

On September 14, 1951, after Reconstruction Finance Corporation, as successor to Rubber Reserve, declined to recognize the claim, Harrisons & Crosfield invoked the arbitration clause of the contract to settle its claim (R. 12-13; Exh. F, Condition 10, R. 26). By letters dated October 2 and October 10, 1951, R.F.C. was notified by the Rubber Manufacturers Association Incorporated (designated for this purpose in the arbitration procedure incorporated in the contract) of the appointment of arbitrators (R. 14-16), and by letter of December 4, 1951, that the arbitration would be held on December 11, 1951 (R. 17-18).

On December 6, 1951, R.F.C. petitioned the district court for an injunction restraining Harrisons & Crosfield from seeking arbitration (R. 5-11). Harrisons & Crosfield moved to dismiss the petition and cross petitioned, on January 3, 1952, for an order under 9 U.S.C. 4 (*infra,* pp. 22-24) to direct R.F.C. to arbitrate the claim allegedly arising under the insurance provisions of the contracts (R. 30-39). R.F.C. opposed the cross petition on the ground, among others, that the claim was barred,

[4] The relative responsibilities and duties of the parties to the contract with regard to the placing or assumption of war and marine insurance risks were covered by complex provisions of the contract, designed to fit varying situations (Exh. F, R. 25).

having accrued more than six years prior to the commencement of the proceeding (R. 43).

The district court held (R. 46-53) that only two issues were triable in a proceeding under 9 U.S.C. 4: (1) the making of the arbitration agreement, and (2) the failure, neglect or refusal to perform the agreement (R. 52). The court declined to pass on the statute of limitations defense, holding that the question was within the competence of the arbitrators (R. 52). Accordingly, R.F.C.'s petition was dismissed and the cross petition of Harrisons & Crosfield granted (R. 53).

The Court of Appeals, Judge Clark dissenting, affirmed the order of the district court, holding (1) that the action to compel arbitration was not time barred since, for this purpose, the six-year period [5] was to be measured from the date of Harrisons & Crosfield's demand for arbitration (in 1951) rather than from the date of the accrual of the claim (in 1942); (2) that the effect of the statute of limitations on Harrisons & Crosfield's claim, although the court assumed the claim to be time barred, was to be remitted to the arbitrators for decision; and (3) that R.F.C. had not discharged its burden of showing circumstances which would

[5] It is common ground in this case that the applicable limitation period is six years as provided by New York law for contract actions or special proceedings. New York Civil Practice Act, § 48, *infra*, n. 13. The federal arbitrative statute contains no independent limitations provision. As to the applicability of state statutes of limitations to proceedings in the federal courts, see *Cope* v. *Anderson*, 331 U.S. 461, 463-464; *Guaranty Trust Co.* v. *York*, 326 U.S. 99; *Holmberg* v. *Armbrecht*, 327 U.S. 392; *Russell* v. *Todd*, 309 U.S. 280; *Stanley* v. *Schwalby*, 147 U.S. 508.

warrant applying the doctrine of laches to Harrisons & Crosfield's asserted right to arbitration, although the judgment of the district court, which had limited the hearing to the two issues specified above, was affirmed (204 F. 2d 366 ff., R. 61-68).

REASONS FOR GRANTING THE WRIT

The Second Circuit, presiding over the center of American commercial activity where arbitration clauses are commonplace, has held that arbitration will be enforced by federal courts even though the underlying claim to be resolved has long been time barred. This strange ruling does not fall into the valid pattern of court decisions designed to foster and encourage the proper use of arbitration procedures. On the contrary, this conclusion, reached through what appears to be legalistic over-refinement, will necessarily encourage the resuscitation and litigation of stale claims and make necessary expensive and prolonged hearings which ought to be avoided. The decision merits, therefore, the attention and consideration of this Court.

1. The core of the holding below is the separation into two parts of the R.F.C.'s defense that the applicable six-year statute of limitations had long run on Harrisons & Crosfield's claim that a breach of the insurance provision of the contract had taken place. The court first held that the statute had not run as to the proceeding, under Section 4 of the Arbitration Act, to compel arbitration since the suit had been instituted within six years of the 1951 demand for arbitration. This holding was announced without regard to the fact, assumed by

the court below, that the six-year limitation period had clearly run on the sole contractual dispute involved. The latter question was then said to be wholly within the competence of the arbitrators, to be determined by them in the course of the arbitration proceedings. 204 F. 2d at 369, R. 65. We submit that this disposition of the problem entirely misconceives the nature of an agreement to arbitrate disputes as well as the power and function of a district court sitting in a Section 4 proceeding.

As stated in *Murray Oil Products Co.* v. *Mitsui & Co.*, 146 F. 2d 381, 383 (C.A. 2), "[a]rbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law." By a contractual agreement to arbitrate, the parties elect, in lieu of their right to a judicial resolution of controversies, to submit their disputes to decision by third persons of their own choosing.[6] Since arbitration is an alternative remedy, the same considerations which have justified the imposition of time limitations on common law and statutory actions, should apply with equal force. Whether a claim be asserted in a court of law or submitted to arbitrators, it is "unjust not to put the adversary on notice to defend within the period of limitation and * * * the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 349.

The basic error of the court below was the at-

[6] Cf. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109; *Marine Transit Co.* v. *Dreyfus*, 284 U.S. 263, 277-279.

tempt to view the arbitration procedure, comprised of the demand for arbitration and the right to compel arbitration if the demand is not honored, as a substantive and separate right, not connected with or dependent upon the claim sought to be asserted. As with all remedies, the validity of the assertion of the right to arbitrate must be measured, for limitations purposes, from the date when the right to invoke the remedy accrued. Here, the right to demand and compel arbitration became perfect when the alleged breach by Rubber Reserve of the insurance obligations of the contract took place in 1942. Respondent should, therefore, be time barred from enforcing the arbitration remedy which the parties had selected, in the same manner as it would have been time barred from attempting to assert a right to judicial resolution of a dispute. The contrary view, adopted by the court below, permits a claim, no matter how stale it may be, to be asserted by means of arbitration long after court action on the same claim would be barred.[7] To hold this is to permit those who, for one reason

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[7] In answer to the suggestion that the court's holding could well result in compelling arbitration of disputes after the lapse of 30 or 50 years, the court suggested, in addition to the possibility of laches, that the parties to a contract embodying an arbitration clause could "easily put in it an 'express time limitation.' " 204 F. 2d at 370, R. 66-67. But we do not conceive how a time limitation placed by the parties upon an agreement to arbitrate could or should be more efficacious for this purpose than a statutory time limitation plainly applicable to arbitration since, if the court's interpretation is correct, such a limitation would presumably not commence to run until there had been a request and refusal to arbitrate, or, if that were not the case, the issue of limitations would still be left for the lay arbitrators.

or another, failed to assert their rights in a reasonable time, to wait with safety until long after memories have faded, evidence is lost and witnesses have died or disappeared.[8]

Nothing prevents the district court from taking account of these very pertinent considerations. While the Federal Arbitration Act ascribes an irrevocable character to arbitration agreements (9 U.S.C. 2)[9] and provides for their enforcement in the federal courts (9 U.S.C. 4), the right to arbitrate is nonetheless not an absolute one, to be enforced by the mechanical issuance of a court order. Section 3 of the Act, for example, provides that a "suit or proceeding * * * brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration" may be stayed by the court until the "arbitration has been had * * *, *providing the applicant for the stay is not in default in proceeding with such arbitration*" (emphasis supplied). Under this section, applications for a stay of court proceedings have been denied because of the applicant's delay in invoking the arbitration clause. *Almacenes Fernandez, S.A.* v. *Golodetz,* 148 F. 2d 625 (C.A. 2); *La Nacional Plantanera* v. *North American F. & S.S. Corp.,* 84

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[8] See *Nagy* v. *Arcas Brass & Iron Co.,* 242 N.Y. 97, 150 N.E. 614: "But the Arbitration Law contemplates prompt action, and too long a delay in seeking appropriate relief may be easily construed as an indication that this claim is waived." See also *Matter of Zimmerman* v. *Cohen,* 236 N.Y. 15, 139 N.E. 764.

[9] "* * * save upon such grounds as exist at law or in equity for the revocation of any contract." *Ibid.*

F. 2d 881 (C.A. 5); *American Locomotive Co.* v. *Gyro Process Co.*, 171 F. 2d 115 (C.A. 6), certiorari denied, 336 U.S. 909; *Radiator Specialty Co.* v. *Cannon Mills*, 97 F. 2d 318 (C.A. 4); *Cargo Carriers* v. *Erie & St. Lawrence Corp.*, 105 F. Supp. 638 (W.D. N.Y.); cf. under the New York Arbitration Law, *Matter of Bauer Co.*, 206 App. Div. 423, 201 N.Y.S. 438; *Nagy* v. *Arcas Brass & Iron Co.*, 242 N.Y. 97, 150 N.E. 614; *Matter of Zimmerman* v. *Cohen*, 236 N.Y .15, 139 N.E. 764.

The Second Circuit has stated that a demand for arbitration must be made "within a reasonable time," *Son Shipping Co.* v. *De Fosse and Tanghe*, 199 F. 2d 687, 689; and, in a proceeding under Section 4 of the Act, the Sixth Circuit has held that a contractual right of arbitration was waived by the party seeking enforcement of the agreement to arbitrate where it had actively participated in a law suit and delayed asserting its right to arbitration for over seven years. *American Locomotive Co.* v. *Gyro Process Co.*, 185 F. 2d 316, 318. See also *Galion Iron Works & Mfg. Co.* v. *J. D. Adams Mfg. Co.*, 128 F. 2d 411, 414 (C.A. 7).

The plain import of these and like holdings is that a district court possesses and must exercise discretion in determining whether an order compeling arbitration is appropriate. However, in the instant case, both the district court and the court of appeals have declined to pass on the question of the effect of the statute of limitations on respondent's claim and have held that the issue must be determined by the arbitrators. The holding of the

court of appeals on this point was predicated upon the assumption that the claim was barred. If the claim is barred, however, and the arbitrators are bound to give effect to the statute of limitations, the court performs a useless act by remitting the question to the arbitrators and, in so doing, puts the parties to unnecessary delay and expense, both of which are contrary to the purpose of arbitration and inconsistent with equitable principles which should govern a proceeding under Section 4. If the arbitrators are bound to give effect to the statute of limitations and fail to do so, their award may be subject to review under Section 10 of the Act (App., *infra*, p. 24). This would merely achieve circuity of treatment. It would be far better that the district court pass on the statute of limitations issue in the first instance.

If, on the other hand, the arbitrators are not bound to give the same effect to the statute of limitations as would a court, or if their determination of the limitations issue is "final and binding" (Exh. E, R. 22) with no appeal on the correctness of their decision (see Sections 10 and 11 of the Arbitration Act, *infra*, pp. 24-25), legal matters clearly not within their technical competence will be remitted to the unreviewable determination of lay arbitrators. It is not lightly to be assumed that the parties contemplated such treatment of a purely legal defense as basic as that of limitations and generally so little dependent on particular facts

or on unique commercial or mercantile knowledge. [10]

Though we believe these principles to be plain, there is no judicial decision directly in point on the question of remitting the statute of limitations issue to arbitrators. The New York Court of Appeals held, under the New York Arbitration Law, that the issue of the cancellation of a contract containing an arbitration clause is for the arbitrators. *Matter of Lipman (Haeuser Shellac Co.)*, 289 N.Y. 76, 78, 43 N.E. 2d 817. But the Court of Appeals decided, on the same day, that, where performance of contracts had been frustrated by orders of the Federal Price Administrator, a stay of arbitration proceedings was properly granted. *Matter of Kramer* v. *Uchitelle, Inc.*, 288 N.Y. 467, 43 N.E. 2d 493; but see *Matter of Behrens (Feuerring)*, 296 N.Y. 172, 71 N.E. 2d 454, where it was held that whether a party was released from a contract when the war precluded performance was a matter within the competence of the arbitrators. With respect to the statute of frauds as a defense to a proceeding to compel arbitration, the New York courts are in apparent disagreement. [11]

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[10] Here, for example, the arbitration panel was to consist of members appointed by the Rubber Manufacturers Association, drawn from the various rubber companies. (Exhs. A, B, C, D, E, R. 12-24). Cf. *Re Arbitration Between Astley & Tyldesley Coal & Salt & Tyldesley Coal Co.* (1899) 80 L. T. 116; cf. dissenting opinion in *Matter of Exeter Manufacturing Co.* v. *Marrus*, 254 App. Div. 496, 499, 501, 5 N.Y.S. 2d 438.

[11] See *e.g.*, *Matter of Exeter Manufacturing Co.* v. *Marrus*, 254 App. Div. 496, 5 N.Y.S. 2d 438; *Matter of Tanenbaum, Textile Co., Inc.* v. *Schlanger*, 287 N.Y. 400, 40 N.E. 2d 225;

It has been said that "proceedings to enforce arbitration presuppose the existence of a valid and enforceable contract at the time when the remedy is sought." *Raphael* v. *Silberberg,* 274 App. Div. 625, 86 N.Y.S. 2d 421; *Matter of Kramer* v. *Uchitelle, Inc., supra.* [12] And this, we believe, constitutes a reasonable approach in determining whether an order to compel arbitration should issue. For the court to determine initially whether the claim is barred by the statute of limitations will in no way determine the merits of a claim or dispute since the limitation pertains only to the remedy. The merits of a claim, if not barred by time, will remain for the arbitrators, more than likely all that the parties intended in the first place. If the claim is barred, the fault lies with those who have inexcusably delayed. [13]

Matter of Ailbrecht Chemical Co. (Anderson Trading Corp.), 298 N.Y. 437, 440, 84 N.E. 2d 625; *Matter of Gitelson & Sons,* 274 App. Div. 480, 482, 84 N.Y.S. 2d 605, 607; *Arthur Philip Export Corp.* v. *Leathertone,* 275 App. Div. 102, 104, 87 N.Y.S. 2d 665, 667; *Airedale Worsted Mills, Inc.* v. *Bonnie Classics,* 198 Misc. 259, 260, 98 N.Y.S. 353.

[12] And see *Matter of Metro Plan, Inc.* v. *Miscione,* 257 App. Div. 652, 15 N.Y.S. 2d 35, where it was held that whether a contract containing an arbitration clause was usurious and hence unenforceable, was for the court. Cf. *Application of Roselle Fabrics, Inc.,* 108 N.Y.S. 2d 921, affirmed, 279 App. Div. 1044, 113 N.Y.S. 2d 280; *Matter of Robinson* v. *Robinson,* 61 N.Y.S. 2d 859, affirmed, 296 N.Y. 778, 71 N.E. 2d 214.

[13] Our position is sustained by the clear text of the applicable New York limitations statutes. Section 48 of the N. Y. Civil Practice Act provides that an action upon a contract obligation "must be commenced within six years after the cause of action has accrued." By Section 10 of the Civil Practice Act, the term "action," as employed in Section 48, is to be construed as including a "special proceeding"; and Section 1459 of the Civil Practice Act provides that the arbitration of a controversy "shall be deemed a special proceeding." Thus, New York im-

2. Harrisons & Crosfield's asserted right to arbitrate should have been barred not only by the statute of limitations, as we have shown above, but also by the doctrine of laches.

(a). Section 2 of the Federal Arbitration Act (9 U.S.C. 2, *infra*, p. 22) provides that a written provision to settle by arbitration a controversy arising out of a contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Where a party to an arbitration agreement is "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" in accordance with their agreement, he may petition any federal court which, "save for such agreement," would

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poses a six-year limitation period (under Section 48) on arbitration. And that this period must be computed from the date when the right to invoke the remedy accrued, is underscored by Section 11 of the Civil Practice Act, which provides:

> The periods of limitation prescribed by this article, except as otherwise specially provided therein, *must be computed from the time of the accruing of the right to relief by action, special proceeding,* defense or otherwise, as the case requires, *to the time when the claim to that relief is actually interposed* by the party as a plaintiff or a defendant in the particular action or special proceeding. [Emphasis supplied.]

Further, Section 15 of the New York Civil Practice Act provides:

> Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced *must be computed from the time when the right to make the demand is complete* * * *. [Emphasis added.]

Even if it be assumed that a demand for arbitration was necessary to start the running of the limitation period, the New York statute equates the right to demand with the demand, thus preventing a claimant from tolling the limitation period by a refusal to act.

otherwise have jurisdiction of the subject matter, for an order directing that the arbitration proceed in the manner provided for in the agreement. 9 U.S.C. 4, *infra*, pp. 22-24.

An agreement to arbitrate is thus "placed upon the same footing as other contracts" [14] and the federal courts are made available for their enforcement. The remedy provided by Section 4 is the equitable remedy of specific performance of the contract to arbitrate and one who seeks specific performance of a contract appeals to the equity jurisdiction of the federal courts and "to the sound discretion which guides the determination of courts of equity." *Meredith* v. *Winter Haven*, 320 U.S. 228, 235; *The Anaconda* v. *Amer. Sugar Co.*, 322 U.S. 42, 44; *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329; *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978 (C.A. 2); cf. *Matter of Feuer Transportation*, 295 N. Y. 87, 65 N.E. 2d 178.

Disregarding the traditional concepts which govern the grant or denial of equitable relief, the district court held that, in a proceeding under Section 4, only two issues were open to the court (R. 52): (1) the making of the agreement, and (2) the failure, neglect or refusal to perform the agreement. The court below correctly rejected this limitation of the district court's function, stating that "as a court, when asked to enter an order, unerd the federal Arbitration Act, requiring a party to arbitrate as he promised, sits 'in equity,' passing on a prayer for specific performance, it must take

[14] H. Rep. No. 96, 68th Cong., 1st Sess., p. 1.

into account equity considerations, and notably laches." 204 F. 2d at 369, R. 65. Cf. *The Anaconda* v. *Amer. Sugar Co.*, 322 U.S. 42, 44. However, the court below, recognizing that laches might serve to bar respondent's right to arbitration, went on to hold that R.F.C. had not discharged its burden of showing laches. 204 F. 2d at 370, R. 66.

Coupled with the affirmance of the district court judgment, this holding, we submit, was clear error since it presupposes, contrary to the fact, that the district judge afforded a hearing in the exercise of his equitable powers. If such a hearing were to be afforded, R.F.C. would then have an opportunity to "discharge its burden" [15] by showing that Harrisons & Crosfields improperly obtained payment, without the presentation of required documents, for the shipment of rubber involved and retained it for approximately eight years, asserting no breach of contract or right to arbitrate until nondelivery of the shipment became known after World War II; that after refund was required the breach of the insurance provisions (yielding a claim for damages in the same amount as the refunded purchase price) was alleged for the first time; that Rubber Reserve and R.F.C. are in no way responsible for respondent's failure to assert its claim sooner nor did they do anything to pre-

[15] In our view, because of the unconscionable delay in asserting its claim, the burden would more properly rest upon respondent "to aver and prove circumstances making it inequitable to apply laches to his case." (*Shell* v. *Strong*, 151 F. 2d 909, 911 (C.A. 10)). However, we assume above, for the purpose of argument, that the burden can properly be placed upon R.F.C.

vent respondent from demanding arbitration of its claim within a reasonable time after January, 1942; that there is but a slender chance of testing the merits of respondent's claim, turning as it does on factual details at the time of shipment, since such testing would depend on practically unknown events and circumstances which took place in Indonesia at a time when chaos and confusion reigned because of the imminent fall of the Netherland East Indies to the Japanese armed forces; and that it would be difficult, if not impossible, to locate the witnesses and marshal the evidence necessary to rebut the claim.

These are all factors that a court of equity should weigh before exercising its power to compel specific performance. None of these factors have been properly shown to or considered by either court below. On the contrary, the court below, by affirming the district court order and at the same time concluding that R.F.C. had not discharged its burden of showing laches, has deprived R.F.C. of all opportunity for hearing on the question.

(b). Moreover, the erroneous conclusion that respondent's cause of action did not accrue until demand to arbitrate gave rise to further error in the court's determination that respondent's right to arbitrate was not barred by laches. It is well established that the propriety of the application of the doctrine of laches to one seeking equitable relief may be measured by reference to statutes of limitations in comparable actions at law. *Gardner* v. *Panama R. Co.*, 342 U.S. 29, 30-31; cf. *Holm-*

berg v. *Armbrecht,* 327 U.S. 392, 396. Such "statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair." *Holmberg* v. *Armbrecht,* 327 U.S. 392, 396. See also *Cope* v. *Anderson,* 331 U.S. 461; *Benedict* v. *City of New York,* 250 U.S. 321, 327; *Guaranty Trust Co.* v. *York,* 326 U.S. 99, 111; *Alsop* v. *Riker,* 155 U.S. 448; *Godden* v. *Kimmell,* 99 U.S. 201.

The court below apparently accepted this principle but misapplied it by looking solely to the lapse of time between the demand and refusal to arbitrate in September 1951 and the commencement of proceedings to compel arbitration in January 1952—a lapse of approximately three months. Having concluded that the action under Section 4 was timely, the court held that a "heavy burden rests on Reconstruction Finance Corporation, as the party setting up laches as a defense, to establish facts which constitute laches in the particular circumstances of this particular case." 204 F. 2d at 370, R. 66.

Assuming the propriety of the measuring period of limitations selected by the court below, the burden placed upon R.F.C. would be more than "heavy." It would be virtually insurmountable since it would be impossible for R.F.C. to show prejudice or disadvantage by reason of the three-month interval. But the measuring limitation pe-

riod thus chosen was completely unrealistic. The matter would be far different if the proper measuring period were employed to determine the applicability of laches, namely, the period commencing when the right to demand arbitration arose in 1942. Use of this measuring period would bring before the court consideration of all the factors which we have enumerated above, pp. 17-18. And there can be no doubt that the proper statute of limitations period is that which commenced in January 1942. Judge Clark, in his dissent, succinctly stated what we believe to be the only reasonable conclusion deducible from the circumstances of this case: "* * * a delay of over nine years where the fair analogy of the limitation statute—so usual a general yardstick of laches—is only six, surely shows laches." 204 F. 2d at 371, R. 67.

3. The questions here presented are of significance not only under the Federal Arbitration Act (9 U.S.C. 1 *et seq.*) but under related state statutes as well. The instant controversy originates in the most important commercial circuit and the decision below establishes the dominant federal law for that central area. Moreover, since virtually all of the 48 states have arbitration statutes akin to the federal act, [16] an authoritative determination by this Court will have an illuminating effect upon the enforcement of private arbitration agreements and thus will be of nationwide reach. Arbitration is a growing instrument of trade and commerce. [17]

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[16] Sturges, *Commercial Arbitration and Awards*, p. ix.

[17] Cf. *Wilko* v. *Swan*, No. 39, this Term, pending on writ of certiorari to the Court of Appeals for the Second Circuit.

The decision below will have especially significant impact upon outstanding Government contracts containing arbitration clauses. We are informed by R.F.C. that the contracts involved in these proceedings are representative of thousands of similar contracts negotiated by subsidiary corporations during the emergency and war years, and that an examination of available records by R.F.C. has revealed that 35 claims aggregating more than $490,000 have been asserted for rubber allegedly shipped to the United States from foreign shores but which, for one reason or another, was never actually placed on board an ocean carrying vessel or, at any rate, never arrived. These could now be revived by the claimants by the utilization, permitted by the decision below, of the arbitration clauses contained in the contracts. In view of all these considerations, we believe that review by this Court is fully warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

OSCAR H. DAVIS,
Acting Solicitor General.

JULY, 1953.

APPENDIX

Title 9 U.S.C. provides in part as follows:

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in

the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make

an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modi-

fying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

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No. 226.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,

v.

HARRISONS & CROSFIELD, LTD., by FRED PUSINELLI & COMPANY, INCORPORATED, Agent,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

FRANCIS A. BRICK, JR.,
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TABLE OF CONTENTS.

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
ARGUMENT	5
1. There is no reason to grant the writ	5
2. The decision below is clearly correct	6
3. Petitioner's contentions lack merit	9
CONCLUSION	11
APPENDIX	12

CITATIONS.

Cases: PAGE

Kulukundis Shipping Co. v. *Amtorg Trading Corp.*, 126 F. 2d 978, 985-986 (1942, C. C. A. 2d) 6, 10

Lipman (Haeuser Shellac Co.), Matter of, 263 App. Div. 880 (1942, 2d Dept.), aff'd 289 N. Y. 76 (1942) 8

Murray Oil Products Co. v. *Mitsui & Co.*, 146 F. 2d 381, 383 (1944, C. C. A. 2d) 9

Pahlberg Petition, In re, 131 F. 2d 968, 971 (1942, C. C. A. 2d) 1

Schoenamsgruber v. *Hamburg Line*, 294 U. S. 454 (1935) 1

Shanferoke Coal & Supply Corp. v. *Westchester S. Corp.*, 70 F. 2d 297, 298 (1934, C. C. A. 2d), aff'd 293 U. S. 449 (1935) 7

Stathatos v. *Arnold Bernstein S. S. Corp.*, 202 F. 2d 525, 526 (1953, C. A. 2d) 9

Utility Oil Corporation, In re, 10 F. Supp. 678, 680 (1934, S. D. N. Y.) 7

Worcester Silk Mills Corporation, In re, 50 F. 2d 966 (1927, S. D. N. Y.) 6

Statutes:

Federal Arbitration Act, 9 U. S. C. 2

Section 4 ..... 2, 3, 6, 7

Federal Rules of Civil Procedure:

Rule 7(a) 3

Rule 8(d) 3

New York Civil Practice Act, Section 1450 ..... 2, 7, 12

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York (R. 46-53) is reported at 106 F. Supp. 358. The opinion of the Court of Appeals (R. 61-68) is reported at 204 F. 2d 366.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).[1]

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[1] Although the objection was not raised below, an order compelling arbitration is not appealable. *Schoenamsgruber* v. *Hamburg Line*, 294 U. S. 454 (1935); *In re Pahlberg Petition*, 131 F. 2d 968, 971 (1942, C. C. A. 2d).

Question Presented.

Only the third of petitioner's "Questions Presented" arises on the record. Even in its broadest terms, it remains purely a procedural question:

> **Are the arbitrators the sole judges of an alleged but controverted defense asserted against the very claim sought to be arbitrated, or must such a defense be tried in the first instance by the District Court upon an application to stay, or to compel, arbitration?**

Aside from assuming the very fact in dispute,[2] petitioner's other two "loaded" questions do not arise on the record, as will be shown in the Statement, *infra*.

Statutes Involved.

9 U. S. C. 2, 4, 10 and 11 are set forth in the Appendix to the Petition. New York Civil Practice Act, Section 1450 —the state statute equivalent to 9 U. S. C. 4—is set forth in the Appendix to this brief, *infra*, pp. .

Statement.

Petitioner's pleadings in the District Court explicitly admitted both the making of the agreement for arbitration (Reply, par. 2, R. 41-42; Exh. F, R. 25-27) and petitioner's refusal to arbitrate (Reply, par. 7, R. 43). Upon the face of the statute (9 U. S. C. 4) these two are the determinative, and the only triable, issues upon an application to compel arbitration. The Federal Arbitration Act (9 U. S. C.) contains no provision *for a stay of arbitration*.

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[2] The District Court specifically found that "There is a dispute as to whether the statute has, in fact, run" (R. 51).

The sole question of limitations arising on this record is restricted to the alleged, but controverted, bar of the claim sought to be arbitrated. Thus, in the pleadings before the District Court—there were no affidavits presented by either side—petitioner's only references to the statute of limitations, laches or "time bar" were as follows:

1. In the petition it was alleged that (R. 10):

> "* * * Since the crude rubber was lost in 1942 and any possible claim against petitioner on account of said loss arose at that time, *the claim asserted by respondent, even if respondent were the proper person to assert the same, is barred by the Statute of Limitations.* (New York Civil Practice Act, Sections 13, 27, 28 and 28a.)" (Italics supplied.)

This allegation was denied by paragraph 8 of respondent's answer (R. 32-33).[3]

2. In petitioner's reply it was alleged that (R. 43):

> "9. *The right of action involved in this controversy did not accrue within six years next before the commencement of this proceeding.*" (Italics supplied.)

This allegation was denied by operation of law. Fed. Rules Civ. Proc., Rules 7(a), 8(d). The District Court duly recognized the controverted status of both these allegations, stating that "There is a dispute as to whether the statute has, in fact, run" (R. 51).

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[3] It should here be noted that, under the plain language of 9 U. S. C. 4, statutory limitation of the claim to be arbitrated is not one of the specified issues triable by the District Court, and accordingly respondent was fully justified in relying upon its pleaded denials without affirmatively showing the facts to support those denials; even if this view were mistaken, 9 U. S. C. 4 still specifically provides for the full trial of disputed issues by the District Court, and no such trial was here had.

The very wording of the above-quoted allegations in petitioner's pleadings demonstrates that the defense of the statute of limitations was directed solely to the claim sought to be arbitrated. This is further borne out by petitioner's own "Statement" in the Petition before this Court wherein, immediately after referring to respondent's cross petition for an order "to direct R. F. C. *to arbitrate the claim allegedly arising under the insurance provisions of the contract*" (italics supplied), petitioner recites that

> "R. F. C. opposed the cross petition on the ground among others, *that the claim was barred,* having accrued more than six years prior to the commencement of the proceeding (R. 43)." (Petition, pp. 5-6, italics supplied.)

There was, therefore, in the record papers before the District Court no allegation or contention whatever by petitioner that respondent's cross-application to compel arbitration was itself barred either by laches or by the statute of limitations. Even beyond this absence of contention, the record facts affirmatively establish the timeliness of respondent's cross-application:

(a) Respondent's demand for arbitration was made on September 14, 1951 (Exh. A, R. 12-13);

(b) Petitioner's order to show cause and petition for a permanent stay were made on December 6, 1951 (R. 3, 11);

(c) Respondent's cross-application to compel arbitration was made on January 3, 1952 (R. 39-40)—*less than one month after petitioner's refusal to arbitrate.*

Finally, the record does not sustain the predicated premise of petitioner's first "Question Presented," to wit, that the demand for arbitration was made "more than nine

years after the contractual right to arbitrate arose" (Petition, p. 2, see also pp. 9, 20). Specifically, the arbitration agreement provided (Exh. F, R. 26):

> "*Failing amicable settlement,* all claims * * * shall be determined by arbitration * * *." (Italics supplied.)

Accordingly, respondent had no contractual right to demand arbitration until its claim had first been refused by petitioner; since the timeliness of the arbitration demand was not questioned in the District Court, the record is understandably silent as to the precise date when "amicable settlement" failed (cf. R. 13), but actually it was only a short while before the demand for arbitration was made.

ARGUMENT.

1. There is no reason to grant the writ.

Petitioner shows no special and important reason why the sound judicial discretion of this Court should be exercised to grant the writ prayed for. There is here involved neither a conflict of decision between the circuits nor a conflict with applicable decisions of this Court. Indeed, the very possibility of any conflict at all is negatived by the complete absence of other decisions on the point here in question.[4]

Although the case may be a novel one, it presents no important question of Federal law that should be settled

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[4] Petitioner is in accord with both courts below in this respect. The Court of Appeals declared (R. 63): "Plaintiff cites no decision, anywhere, relative to this question." The District Court declared (R. 52): "* * * there are no precedents based on the defense of the statute of limitations * * *." Petitioner itself now declares (Petition, p. 13): "* * * there is no judicial decision directly in point on the question of remitting the statute of limitations issue to arbitrators."

by this Court. Entirely apart from the specific defense of limitations, the Federal courts (unlike the New York state courts) have seldom, if ever, been called upon in the past to decide the question whether a defense to the arbitrable claim itself is triable by the court rather than by the arbitrators. Cf., *e. g., Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 985-986 (1942, C. C. A. 2d); *In re Worcester Silk Mills Corporation*, 50 F. 2d 966 (1927, S. D. N. Y.). Since there is thus no pressing urgency about the question, it scarcely merits immediate consideration and review by this Court.

Moreover, in view of the wide divergence and differences between the arbitration statutes of the various states, a construction of the particular provisions of the Federal statute by this Court would have no widespread bearing or effect and would be of little assistance to the state courts in construing the precise wording of their local statutes.

Finally, the question itself is of little practical significance. On this score, petitioner merely suggests that out of a total of 35 supposedly stale claims involving an aggregate of perhaps a half million dollars, some may now be revived and pressed to arbitration (Petition, p. 21). Aside from the relative unimportance of this suggested threat, it is perfectly obvious that the defense of limitations—if justified—can be urged with as great force and effect before the arbitrators as before a court.

2. The decision below is clearly correct.

Both courts below explicitly ruled that it was for the arbitrators—not the court—to determine whether the statute of limitations is a bar to the claim sought to be arbitrated. These rulings are in accord not only with the specific language of the Federal statute (9 U. S. C. 4), but

also with a host of state court decisions construing the equivalent New York statute (Civil Practice Act, Section 1450).

Section 4 of Title 9, U. S. C., expressly provides that upon a petition to compel arbitration,

> "* * * The court shall hear the parties, and upon being satisfied that *the making of the agreement for arbitration or the failure to comply therewith* is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * *" (Italics supplied.)

The statute further provides that if either the making of the arbitration agreement or the non-performance thereof *be in issue*, "the court shall proceed summarily to the trial thereof," and if it be found "that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder," the court shall summarily order the parties to proceed with the arbitration.

Thus, apart from purely jurisdictional requirements, the plain language of the Federal statute clearly proposes only two issues to be decided by the court in the first instance—namely, the making of the arbitration agreement and the non-compliance therewith—and if they are decided in favor of the party seeking arbitration, then arbitration must be directed as a matter of course.

Since the Federal statute closely follows—indeed, was in general copied from—the New York arbitration statute,[5] judicial construction of the virtually identical language of Section 1450 of the New York Civil Practice Act (Appen-

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[5] *Shanferoke Coal & Supply Corp.* v. *Westchester S. Corp.*, 70 F. 2d 297, 298 (1934, C. C. A. 2d), aff'd 293 U. S. 449 (1935); *In re Utility Oil Corporation*, 10 F. Supp. 678, 680 (1934, S. D. N. Y.).

dix, *infra*, pp. ~~11-12~~ 12-13), affords persuasive and effective guidance. Although a score of decisions of identical import were cited to the courts below, reference to one mentioned by the Court of Appeals (R. 63) will here suffice.

> *Matter of Lipman (Haeuser Shellac Co.)*, 263 App. Div. 880 (1942, 2d Dept.), aff'd 289 N. Y. 76 (1942).

In that case the Appellate Division declared (263 App. Div. 880, at pp. 880-881):

> "Under section 1450 of the Civil Practice Act, only two issues may be tried in a proceeding of this kind, (a) whether an agreement to arbitrate was made, and (b) whether there was a failure or refusal to arbitrate. Appellant admits that it made the contract containing the agreement to arbitrate and that it has failed and refused to proceed to arbitration. Those issues, therefore, are not open. *Every other issue in the proceeding, whether of fact or of law, and whether raised by denial or by defense, is for the arbitrators exclusively.*" (Italics supplied.)

The Appellate Division's summary direction of arbitration was affirmed by the New York Court of Appeals, which likewise declared (289 N. Y. 76, at p. 80):

> "* * * when once an agreement to arbitrate has been made, such an agreement must be considered in the light of the broad language used in the above arbitration statute. (Civ. Prac. Act, §1450.) This language seems to imply that *all acts of the parties subsequent to the making of the contract which raise issues of fact or law, lie exclusively within the jurisdiction of the arbitrators.* * * * The language of the agreement to arbitrate of course, must be sufficiently broad so as to permit of the application of *the general principle that all issues subsequent to the making*

of the contract are not for the court but for the arbitrators.'' (Italics supplied.)

Accordingly, in the case at bar, although the courts below were guided by no direct precedent upon the precise question of the statute of limitations, their common ruling was in full accord both with the plain language of the Federal arbitration statute and with the compelling weight of the numerous and uniform decisions by New York courts upon closely related questions under a comparable statute.

3. Petitioner's contentions lack merit.

Petitioner's entire argument (Petition, pp. 7-20) is predicated upon a basic, if not deliberate, confusion and identification of ''the right to arbitrate'' with ''the claim to be arbitrated.'' This confusion is the essential element needed in order to impart even a semblance of logic to petitioner's contention that whatever bars ''the claim to be arbitrated'' should *ipso facto* bar ''the right to arbitrate.'' Here the particular bar asserted is the alleged but disputed defense of the statute of limitations, but it might just as easily be release, or fraud, or unclean hands, or any other defense to the arbitrable claim.

Although arbitration is merely a form of trial, to be adopted in place of the trial at common law[6], petitioner's argument seeks to change it into some form of substantive matter, so that the right to trial before arbitrators shall somehow be made dependent upon the non-existence of any valid defense to the very claim sought to be arbitrated. Petitioner's purpose is transparent: it simply seeks to have

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[6] *Stathatos* v. *Arnold Bernstein S. S. Corp.*, 202 F. 2d 525, 526 (1953, C. A. 2d); *Murray Oil Products Co.* v. *Mitsui & Co.*, 146 F. 2d 381, 383 (1944, C. C. A. 2d).

its alleged defense to respondent's claim tried before the District Court in the first instance, and not before the arbitrators.

To accede to petitioner's purpose is, of course, to vitiate the very aim and function of the arbitral process—namely, the immediate and speedy trial of disputed claims, without either the impediment of legal manoeuvre and delay, or the costliness of litigation. A further effect of petitioner's proposal would be to preclude the arbitrators from ever passing upon asserted defenses to the claim in arbitration; since such defenses would necessarily be tried by the court in the first instance, there would be no justification for a further retrial by the arbitrators. Cf. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp., supra,* 126 F. 2d 978, 985-986. Significantly, petitioner suggests no reason why such defenses should be singled out for exclusion from the arbitrators' consideration.

Petitioner's anxiety to avoid a trial before the arbitrators cannot readily be fathomed. The arbitration agreement was a basic part of the printed contract form prepared by petitioner's predecessor (Exh. F, R. 25-27). That contract form as well as the arbitration procedure therein incorporated were likewise specifically approved by the board of directors of petitioner's predecessor long before the contracts herein question were executed (Exh. E, R. 19). Surely petitioner cannot now be heard to question the competence and integrity of the arbitration panel which its predecessor had thus selected after mature deliberation (but see Petition, p. 13, footnote 10).

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Donovan Leisure Newton & Irvine,
Burr F. Coleman,
Of Counsel.

APPENDIX.

Omitting matter not here relevant, Section 1450 of the New York Civil Practice Act provides:

"**§1450. Remedy in case of default.** * * * A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in such section may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission. * * * The court, or a judge thereof, shall hear the parties and upon being satisfied that there is no substantial issue as to the making of the contract or submission or the failure to comply therewith, the court, or the judge thereof, hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission.

"If evidentiary facts be set forth raising a substantial issue as to the making of the contract or submission or the failure to comply therewith, the court, or the judge thereof, shall proceed immediately to the trial thereof. If no jury trial be demanded by either party, the court, or the judge thereof, shall hear and determine such issue. Where such an issue is raised, any party may, not later than five days after the service of the order directing a trial of such issue, demand a jury trial of such issue, and if such demand be made, the court, or the judge thereof, shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action. Whenever an immediate trial is ordered, the order therefor shall provide that if the court, or where a jury has been demanded, the jury, find that a written contract providing for arbitration

was made or a submission was entered into, as the case may be, and that there was a failure to comply therewith, the parties shall proceed with the arbitration in accordance with the terms of the contract or submission, and said order shall provide that if the court or jury, as the case may be, find that there was no such contract or submission or failure to comply therewith then the proceeding shall be dismissed.

"The procedure herein provided shall be applicable to any motion made under this article in which an issue is raised as to the making of the contract or submission or the failure to comply therewith."